IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 199 F 2002
WITH
CRIMINAL APPLICATION NO.644 OF 2006

Ziya-ul-huq J.Shaikh and others .... appellants

versus

The State of Maharashtra ... Respondent.

Shri Vijay Hiremat for appellant nos. 1,2,4,6,7,10 & 11.
Shri. D.G.Khamkar for appellant nos. 5.8.9 & 12.
Smt. Pranali P.Kakade for appellant no.3.
Dr. F.R.Shaikh APP for respondent.

CORAM; V.G. PALSHIKAR &
SMT.NISHITA MHATRE, JJ.

DATED; 17h October, 2006.

JUDGMENT (Per Palshikar J.):

1. By this appeal 12 original accused have challenged their conviction under different sections of the Indian Penal Code on various grounds mentioned in the memo of appeal as also on the basic ground of faulty investigation as argued before us by the learned advocate appearing on behalf of the appellant.

2. We have scrutinised the evidence on record. We have re-appreciated the same. The prosecution examined eight witnesses to prove that the accused persons

committed several robberies/decoities in one village during the Diwali days of 1999. According to the prosecution in the night of 6th and 7th November 1999 around 11.30 p.m. there was commotion in the village and the inhabitants of the village were attacked by the gang of thieves. Robberies were committed in couple of houses atleast. All the accused persons looked like of similar height and of similar structure. Investigation was conducted and we must note with regret that it was very shabily conducted. Only eight witnesses were examined. P.w.no.1 Pandharinath has specifically stated in court that he was beaten up by the accused, yet the prosecution has not examined any medical officer to prove the injury on the person of the victim and the witnesses. According to the prosecution, these robberies took place in the mid night and after committing robberies in a couple of houses, the accused ran away. They were thereafter arrested and prosecuted in the manner noted above.

3. Assailing the judgment of the conviction, the learned advocate appearing on behalf of the accused persons heavily relied on the Criminal Manual framed by this court for the purposes of balance of pleas in their investigation of crimes. It is issued by this court for guide-lines of the criminal court and subordinate officers in police. It is a detailed

Manual in which directives are given for proper and adequate investigation of all crimes. Para 16 of this Manual deals with identification parades. It says that as far as possible judicial officers should not associate themselves with identification parades. It then provides that the identification parade be conducted by special Magistrate or Honorary Magistrate and then substantial directions which the Magistrate holding identification parade should follow and the guide-lines given below which are illustrative and may not be exhaustive. Then some guide-lines are issued.

Guide-line I reads as under:

> **(i) All members of a group of suspects more than two should not be paraded together. There should be more parades than one, each including not more than two. Two suspects of obviously dissimilar appearance should not be included in the same parade. Identification numbers should be concealed.**

It is therefore provided that in the group of suspects more than two should not be paraded together and if necessary more parades than one be conducted. There are several other guide-lines with which presently we are not concerned. The contention raised on behalf of the accused is this guide-line (i) contained in sub

para (2) of para 16 has been totally violated while conducting the identification parade of these accused persons in this case.

4. This Manual also provides that identification parade should be held as far as possible in jail and they should not be held in the police station. This guide-line is also violated.

5. The prosecution has examined one Narayan as P.w.3 who was the Executive Magistrate, who conducted the identification parade on 15-11-1999. He states that the identification parade was held by him in his room i.e. in Tahasildar's room and he has clearly admitted that thereafter 12 accused persons were brought out from the custody from sub jail at Khed. This proves two things that there was a sub jail in which the accused were launched and that the identification parade was not held in the jail but in the office of the Magistrate. Apart from that the witness then admits that he asked 21 persons to stand in a line for the purposes of carrying identification parade of four persons. He then asked them to stand between the 21 witnesses at the places of their choices. He then asked the four accused persons that they can change their clothes if they desire. He then brought serially one witness after the another to identify the accused.

Ultimately the four accused persons were put in one parade but the maximum number prescribed by the guide-line is two. No reason whatsoever has given by violating the guide-lines. According to the learned advocate on behalf of the appellant, this basically caused substantial injury to the appellants. Their identification is not proper and therefore the protection granted to the witnesses by the Constitution as also by the Criminal Manual in which procedure for holding identification parade is elaborately given. In fact, these guide-lines are issued for effective implementation of the provisions in Article 22 of the Constitution of India pertaining to arrest and detention of persons in police custody. All these aspects regarding Criminal Manual and test identification parade were considered by this court in **1995 Criminal Law Journal page 4048,** where a Division Bench of this court on consideration of the Criminal Manual held that such test should be conducted not in police custody but in jail. It then observed that in the test identifications parade, not more than two suspects at a time should be put in one parade for identification. Both these requirements of the Criminal Manual have been plainly violated in the present case also. The Division Bench of this court in the above referred judgment has elaborately dealt with the law pertaining to test identification parade.

Their observations are noteworthy. In paras 16 and 17 of the said judgment, this court has observed as under:

> **16. We strongly deprecate the practice of conducting identification at police stations, a practice which we are informed at the Bar is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the probability of the suspects being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the court that the witnesses might have seen the suspects prior to the test identification.**
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> **17. In order to make identification evidence beyond reproach, it is high time that an end is put to practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the stigma of showing suspects prior to their identification; a stigma which more than often is unfounded, but has manifold other advantages. Jails**

have a large population these days. It would be easy there to find persons similar to the suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification.

6. A copy of this judgment was sent by this court to the Director General of Police, Principal Secretary Home Department, Judicial Secretary Law and Judiciary Department to bring to their knowledge and notice the requirements of Criminal Manual and adherence to the provisions thereof by the police officers or Executive Magistrate conducting test identification parade. Inspite of that the test identification parade held for the purpose of accused in this appeal had lacuna, which are obvious from the deposition of P.w.3 Narayan. There was sub jail available yet identification parade was not conducted in the sub jail. This court in para 17 of the above quoted judgment has observed that the parade should be held in jail. We are in respectful agreement with the observations made by the Division Bench and according to us this dicta of the judgment reported in **1995 Cri.L.J. 4048** is liable to be followed. Necessary consequence of it would be compelling us to acquit the accused persons for the lapses committed by the police and the prosecution in the conduct of investigation of this case. We would

like to note that there are serious errors committed in the conduct of test identification parade in the present case which are as under:

i) It was held in the office of the Tahasildar though sub jail was available and the accused persons were produced from that sub jail.

ii) Similar witnesses for holding the parade were selected before the accused were seen by the Magistrate. It is observed by this court in para 17 noted above that the dummies should be mixed with the appellants and they bore similar physical appearance. The dummies having been made before the accused were seen is thus a second serious error.

iii) The Criminal Manual provides provision, which atleast by this judgment reported above, has become a rule of law for the State of Maharashtra, which is again breached and four persons (accused) were put for identification in one parade when the requirement of not more than two should be there.

7. These two errors of substantial nature have vitiated the entire prosecution and the ocular testimony of P.ws. 1 and 2 who were assaulted and robbed is required to be rejected. Because the test identification parade was faulty, their identification thereafter in court has to be rejected. Because of the lapses in the investigation, a stage is reached where this court is compelled to reject the ocular testimony to confirm the conviction rendered by the trial court. For all these reasons we need not further discuss the evidence of other five witnesses. But we must note before conclude that in this case medical evidence is also not put forward by the prosecution though the witness complained of being beaten by the accused. Basic precaution of seeking corroboration by independent evidence is also not taken in this case.

8. In the result, therefore the appeal has to be allowed and is accordingly allowed. The accused are already in jail if they are not required in any other case, they should be set at liberty immediately.

Criminal application if any is also dismissed.

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FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE.
CRI. APPEAL NO. 199 OF 2002

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The State of Maharashtra .... Respondent.

Office Notes, Office Memorada orders or directions and Registrar‘s orders.	Court‘s or Judge‘s Orders.
	Shri Vijay Hiremat for appellant nos. 1,2,4,6,7,10 & 11. Shri. D.G.Khamkar for appellant nos. 5.8.9 & 12. Smt. Pranali P.Kakade for appellant no.3. Dr. F.R.Shaikh APP for respondent. **CORAM; V.G. PALSHIKAR & SMT. NISHITA MHATRE, JJ.** **DTAED; 17TH OCT., 2006.** **P.C.** 1. For reasons recorded separately, the appeal has to be allowed and is accordingly allowed. The accused are already in jail if they are not required in any other case, they should be set at liberty immediately. Criminal application if any is also dismissed.

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